

Message

From: Maher, Lauren [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B31491F235ED4F42B8993457B426F4FE-MAHER, LAUR]
Sent: 10/26/2017 7:01:00 PM
To: Ying, Evelyn (ENRD) [Evelyn.Ying@usdoj.gov]
CC: Siegal, Tod [Siegal.Tod@epa.gov]; Marshall, Tom [marshall.tom@epa.gov]
Subject: Status of EPA ME, WA, and ID actions

Hi Evelyn,

As we discussed earlier today, below is a synopsis of the current status of EPA's actions in Maine, Washington, and Idaho. I've cc'ed Tod, who joined us earlier, and Tom Marshall, who is the head of the Indian law practice group in OGC (after Tony's retirement).

- **Maine:**

- **Current status:** In litigation before the U.S. District Court in Maine. The case is currently stayed pending EPA's review of Maine's petition for reconsideration; EPA committed to report to the court what, if any, challenged decision EPA intends to change on or before December 8, 2017. Dave Carson is representing EPA in that litigation, and the case number is 1:14-cv-264-JDL.
- **Brief background:** Maine sued EPA in 2014 to require the Agency to act on the State's water quality standards (WQS), including as applied to Indian country waters. In 2015, EPA approved and disapproved a number of Maine WQS. Maine sued EPA over a subset of EPA's decisions: 1) the approvals of the designated use of sustenance fishing for waters in Indian country (which was based in part on the DOI letter referenced below), and 2) the resulting disapprovals of criteria that did not protect the sustenance fishing use. In February and March 2017, EPA received two petitions, one from Maine and the other from three Maine dischargers, to reconsider the sustenance fishing designated use approvals, all disapprovals, and EPA's federal rule that followed the disapprovals.

- **Washington:**

- **Current status:** No litigation. In February 2017, a coalition of industry groups filed a petition for reconsideration of EPA's partial disapproval of Washington's WQS and repeal of EPA's promulgation. In July 2017, the Northwest Indian Fisheries Commission filed a request that EPA deny the petition for reconsideration.
- **Brief background:** EPA proposed revised WQS for Washington in September 2015, addressing treaty rights in its proposal and using a similar analysis as used in Maine to harmonize the Clean Water Act with tribal reserved fishing rights. In August 2016, Washington submitted revised WQS. In November 2016, EPA partially approved and partially disapproved WA's submission, and promulgated federal standards for the disapproved criteria.

- **Idaho:**

- **Current status:** **Atty-Client / Atty WP / Deliberative / Ex.5**
- Atty-Client / Atty WP / Deliberative / Ex.5
- **Brief background:** EPA previously disapproved Idaho's WQS in 2012 as not being sufficiently protective; treaty rights were not the basis for that disapproval.

Please let us know if you have any questions, and thanks again for keeping us updated.

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From: Ying, Evelyn (ENRD) [<mailto:Evelyn.Ying@usdoj.gov>]
Sent: Tuesday, September 26, 2017 9:20 PM
To: Maher, Lauren <Maher.Lauren@epa.gov>
Subject: RE: Cites to Culverts in DOI Letter & EPA Rules

Laura, thank you for emailing me this information and attaching the letter and notices. Evelyn

From: Maher, Lauren [<mailto:Maher.Lauren@epa.gov>]
Sent: Tuesday, September 26, 2017 4:47 PM
To: Ying, Evelyn (ENRD) <EYing@ENRD.USDOJ.GOV>
Subject: Cites to Culverts in DOI Letter & EPA Rules

Hi Evelyn,

As we discussed yesterday, in January 2015, the DOI Office of the Solicitor sent a letter to EPA Office of General Counsel analyzing the scope of fishing rights for certain Maine tribes, and addressing whether those rights may have a water quality component. As part of the latter analysis, DOI referred to the district court decision in the culverts litigation. The letter is attached, and the relevant language is pasted below. EPA cited to the Ninth Circuit's culverts decisions in its final rules disapproving water quality standards in Washington (November 2016) and Maine (December 2016). The attached two federal register notices contain the relevant language, which is also excerpted below.

- **DOI Letter to EPA** (pg 9): "Ongoing litigation in Washington State involving questions about the extent to which tribal fishing rights encompass associated rights to protection for fish habitat also informs our analysis. The tribes and the United States have argued that tribal fishing rights impose a duty on the state of Washington to refrain from building or maintaining road culverts that directly block fish passage both to and from breeding areas and therefore significantly and directly kill fish, diminish fish populations, and diminish habitat. In 2013, the court adopted this analysis, concluding that the tribes' treaty based fishing right had been "impermissibly infringed" through the construction and operation of culverts that "has reduced the quantity of quality of salmon habitat, prevented access to spawning grounds, reduced salmon production ... and diminished the number of salmon available for harvest. The court issued a permanent injunction forcing the State to renovate its culvert system. The decision is currently on appeal, but the district court's reasoning is consistent with the view that tribal fishing rights can be protected under the Clean Water Act."
- **Washington Preamble** (81 Fed. Reg. 85,423 n.39 (Nov. 28, 2016)): "While EPA's action is based on harmonizing the requirements of the CWA with the terms of the treaty-reserved subsistence fishing right, the action also is consistent with federal Indian law principles addressing subsidiary treaty rights. A written legal opinion from the Solicitor of the U.S. Department of Interior (DOI) to EPA analyzed whether tribal reserved fishing rights include subsidiary rights to sufficient water quality. . . . [and] identified several court decisions, including Supreme Court decisions interpreting the reserved fishing right in the Stevens Treaties, which have held that fishing rights for tribes encompass subsidiary rights that are necessary to render those rights meaningful. [Citations omitted]. Consistent with these precedents, in June 2016 the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's finding that barrier culverts constructed by the State of Washington obstructing fish passage were in violation of tribal fishing rights set forth in the Stevens Treaties, noting that "the Tribes' right of

access to their usual and accustomed fishing places would be worthless without harvestable fish.” United States v. Washington, 2016 U.S. App. LEXIS 11709 at *31. The court also acknowledged that the fishing clause of the Stevens Treaties could give rise to other environmental obligations, but that those would need to be addressed on a case-by-case basis depending on the precise nature of the action. Id. at *18-19. Consistent with this body of case law, DOI’s legal opinion concludes that ‘fundamental, longstanding tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right.’”

- **Maine Preamble** (81 Fed. Reg. 92,479-80 (Dec. 19, 2016)): “The Ninth Circuit Court of Appeals recently determined that the right of tribes in the State of Washington to fish for their subsistence in their ‘usual and accustomed’ places necessarily included the right to an adequate supply of fish, despite the absence of any explicit language in the applicable treaties to that effect. Specifically, the Court held that ‘the Tribes’ right of access to their usual and accustomed fishing places would be worthless without harvestable fish.’ Similarly, it would defeat the purpose of MIA, MICSA, MSA and ABMSA if the Maine tribes could not safely sustain themselves consuming the fish they can catch from their waters.”

Please let me know if there’s any other information I can provide, or if you’d like to discuss further.

Very best,

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